



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 503 OF 2015

IN THE MATTER OF AN APPLICATION BY PAUL KARANJA KAMUGE T/A DAVISCO AGENCIES, SIMON PETER KARANJA AND FRANKLIN IMBEZI FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS AGAINST HON CHESANG (MS) RESIDENT MAGISTRATE, MILIMANI CHIEF MAGISTRATE'S COURT

AND

IN THE MATTER OF MILIMANI CHIEF MAGISTRATES COURT CIVIL SUIT NO. 7209 OF 2015

AND

IN THE MATTER OF THE ORDERS OF MILIMANI CHIEF MAGISTRATES COURT (HON. CHESANG) ISSUED ON 2ND DECEMBER 2015)

AND

IN THE MATTER OF ENVIRONMENT AND LAND COURT ACT, CHAPTER 12A OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE MAGISTRATE'S COURT ACT, CHAPTER 10 OF THE LAWS OF KENYA

IN THE MATTER OF ARTICLES 10, 47 AND 62 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLICAPPLICANT

VERSUS

HON. CHESANG (MS)

RESIDENT MAGISTRATE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

KENYA AFRICAN NATIONAL UNION.....INTERESTED PARTY

EX PARTE: PAUL KARANJA KAMUNGE T/A

DAVISCO AGENCIES, SIMON PETER KARANJA &

FRANKLIN IMBEZI

RULING

Introduction

1. By a Notice of Motion dated 31st December, 2015, the *ex parte* applicants herein seek the following orders:
 - a. **This application be certified urgent and admitted to hearing during the honourable court's vacation**
 - b. **Notice to show cause to issue to Hon. Nickolas Salat (the secretary general of the interested party) and Mr. Richard Kerich (the OCPD Buruburu Police Station) to state why they should not be committed to civil jail for disobedience of the orders of the Honourable court (Hon. Justice G.V. Odunga) issued on 17th December 2015**
 - c. **Hon. Nickolas Salat (the Secretary General of the Interested Party) and Mr Richard Kerich (The OCPD Buruburu Police Station) be committed to prison for 6 months or such period as this honourable court shall determine for contempt of the decision/orders of the honourable court (Hon. Justice G.V. Odunga) issued on 17th December 2015.**
 - d. **Such further or other consequential orders as may seem just to this honourable court.**
 - e. **Costs of and occasioned by these proceedings to be borne by the respondents.**

Ex Parte Applicants' Case

2. According to the applicants, the 1st and 2nd applicants are the joint owners of all that property on known as residential plot B Jericho Estate off Shule Road (hereinafter referred to as the suit property) having purchased the same from the 3rd Applicant and one, **Eston Sabari Odongo**.

3. They contended that on 2nd December, 2015 the trial court (**Hon Chesang** (Ms) Resident Magistrate) issued orders sanctioning their eviction from the suit property. Aggrieved by the said decision, the applicants on 17th December 2015 promptly applied for leave to apply for judicial review orders of certiorari and mandamus challenging the said decision and on the same date this Court issued orders, *inter alia* that:

- a. Leave be and is hereby granted to the Applicants to apply within 14 days for:
 - i. An order of certiorari to remove to this honourable court to be quashed the decision of **Hon. Chesang** (Ms) Resident Magistrate, Nairobi – Milimani Chief Magistrates Court, made on 2nd December, 2015 civil Suit No. 7209/2015: Kenya African National Union –versus – Paul Karanja

Kamunge, Simon Peter Karanja & Franklin Imbezi, sanctioning the eviction of the Applicants from their property on known as residential plot B Jericho Estate off Shule Road without a hearing at all or due process; and in excess of her jurisdiction.

ii. An order of mandamus compelling the 1st Respondent to set aside all the proceedings taken before court Hon. Chesang (Ms) RM, and all the orders issued in Milimani Chief Magistrates court Civil Suit No. 7209 of 2015; Kenya African National Union – versus – Paul Karanja Kamunge, Simon Peter Karanja & Franklin Imbezi by the learned Magistrate in excess of her jurisdiction.

b. There be no further action taken with a view to implementing trial court's decision.

c. The Respondents be served for further orders 25th January 2015

3. According to the applicants, in granting the above orders, the Honourable court stayed the impugned decision of the trial court and directed that no further action be taken whatsoever with a view to implementing the court's decision. The said orders, it was averred, were extracted on the 17th December 2015 and on 18th January, 2015 the same served upon the contemnors herein who duly accepted service thereof. To the applicants, upon service, the foregoing orders commanded immediate compliance by the contemnors until otherwise directed by the honourable court.

4. However, in open contempt/violation of the decision/orders of the court, the Interested Party colluded with police stationed at Buruburu Police Station to deny the ex parte Applicants access to the suit property contrary to the Honourable court's orders. It was contended that the said police officers were in full time occupation of the suit property and totally barred them entry into the property. In so conducting itself, it was contended that the Interested Party was aided by the 2nd Contemnor herein, **Mr. Richard Kerich** who deployed police officers from Buruburu to the suit property to deny the applicants access therein.

5. . With the intent of making the suit property inaccessible and inhabitable and in violation of the court orders herein, the applicant averred that the interested party further fenced off the suit property and embarked on construction of other structures thereon, in violation of the said orders. Further, the interested party, under the guidance of **Hon. Nick Salat** (the 1st Contemnor herein) in further contempt of the said orders and in a bid to defeat the same demolished structures that the applicants had previously constructed before forceful/illegal entry of the interested party into the suit property as aforesaid.

6. To the applicant, the interested party was hell-bent on implementing the trial court's decision contrary to the orders herein and notwithstanding the fact that the trial court's impugned decision was stayed pending the hearing of the substantive motion for judicial review.

7. The applicant asserted that the contemnors herein have little regard for court orders and blatantly stated on numerous occasions upon being served that the honourable courts orders herein have no basis at all and they cannot obey the said orders "no matter the circumstances". In the applicant's view, the said contemnors made a mockery of the Court and the court's due process, decisions and orders as a result of the foregoing contemptuous acts. These actions, it was contended undermine the Court and the sanctity of court processes, and put the dignity of the honourable court to ridicule. The abovementioned acts of the contemnors, the applicant contended were contemptuous of the honourable court and its orders herein, and will defeat and/or render vain the fair and just determination of the matter before court unless deterred. To the applicant, the contemnor's contemptuous conducts aforesaid have and will continue to compromise the pending matter currently before court and the application herein and undermine the authority of the honourable court fairly and justly determine this suit, unless the court urgently intervenes as sought.

8. To the applicants, it is fair and just that the orders sought herein be granted to uphold the integrity of the honourable court and court processes; and to secure that court process and court decisions/orders are not rendered vain.

Interested Party's Case

9. The application was opposed by an affidavit sworn by **Nick Salat**, one of the alleged contemnors and the Secretary General of the interested party herein.
10. According to the deponent, the parcel of land in question is a property of the interested party herein and not the ex-parte applicants. He averred that the application for the contempt of court has never been served either upon him or the interested party itself though he was made aware by a member of the interested party, a **Mr. Eston Sabari Adongo**, that the ex-parte applicants were seeking to commit him to prison for a period not exceeding 6 months for an offence of contempt in court in these proceedings.
11. He accordingly sought legal advice and assistance from the interested party's counsel and upon paying for his services, the said counsel proceeded to court and obtained photocopies of the pleadings herein from which he clearly learnt the orders obtained by the interested party in **CMCC No. 7209 of 2015**.
12. According to the deponent, they did not authorise the interested party at all to evict the ex-parte applicants from the suit land more specifically known as "the KANU office" situate at Harambee Estate, Nairobi. In his view the property referred to by the applicants being unsurveyed *Plot 'B'*-off Ofafa Jericho is different from that which is situate along Mbagathi road, hence the parcels of land in issue herein are different in reference.
13. While admitting that the applicant applied for and obtained leave and directions that the same operates as a stay, the deponent contended that the said court order was never served upon either the interested party or himself. He however came to know about the said courts orders of 17th December 2015 after his lawyer obtained a photocopy of the pleadings and the proceedings herein on 2nd February 2016.
14. The deponent asserted that the interested party has been in active occupation of the suit premises since 1987 and has neither sold nor authorized any of its officials, employees or agents to either sell or lease the suit land to any person(s) or party (ies) at all.
15. While admitting that he knew **Mr. Eston Sabari Adongo** and **Franklin Imbezi** (3rd ex-parte party) averred that both persons were caretakers who managed the suit premises on behalf of the interested party but were never at any one time joint proprietors of the suit premises at all hence it was misleading and incorrect to state on oath that the ex-parte applicants acquired the ownership interest in the suit premises from **Eston Sabari** and **Franklin Imbezi** on 12th December 2013 and support such averment with copies of the documents from Nairobi City Council and Nairobi City Commission date 12th March 1997. According to the deponent, since the City Council of Nairobi ceased to exist as such in the year 2010, with the promulgation of the new constitution and the creation of the county governments, one would have expected the ex-parte applicants to exhibit documents issued to them by the Nairobi City County and not Nairobi City Council/Nairobi City Commission.
16. According to the deponent, what the interested party did on the parcel of land in November & December 2015 was to renovate its offices at suit premises and not to evict the ex- parte applicants. To his understanding, this court's order dated 17th December 2015 did not require the alleged contemnors to do anything that either failed to do or disobeyed.
17. According to him, the 1st respondent issued an order to the interested party directing the 1st and 2nd ex-parte applicants to remove the red soil from the entrance of suit premises that houses the interested party's offices and not to evict them. Pursuant thereto, the interested party removed the soil from the entrance to the suit premises and erected a permanent fence around its boundaries before 7th December, 2015. Subsequently, the ex-parte applicants filed this cause on the 16th day of December 2015 and obtained orders on the 17th December 2015 prohibiting further action with a view to implementing the trial court's decision, over 10 days after the interested party had completed removing the soil from the entrance and constructing a wall around the suit premises. The order, according to the deponent, stated

that there be no further action taken with a view to implementing the trial court's decision hence the order stayed the implementation of the chief magistrates court orders that were executed earlier before the cause was filed and orders of stay issued.

18. It was deposed that when this Court stayed the implementation of the 1st respondent's orders dated 2nd December 2015, the applicants collected goons and attempted to demolish the perimeter fence and the KANU office in the suit premises and that these were the actions which were reported to the Buruburu police station who came and provided security.

18. To the deponent, this application fails to specify what acts have been committed by the Buruburu OCPD and the deponent that amounts to disobedience of this court's order of 17th December 2015. On the contrary, his position was that he had not committed any acts of contempt against this Court since by the time these orders were obtained herein, the interested parties had not carried out any works at the suit premises which could amount to contempt.

Determinations

20. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions made.

21. The law on contempt in this country is now well settled. Court orders are not made in vain and are meant to be complied with and if for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.

22. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. GulabchandPopatlal Shah & Others Civil Application No. Nai. 39 of 1990.**

23. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any

misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court...Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant”.

24. In Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

25. Similarly, in Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458, it was held that:

“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.”

26. Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly. As was held in Teacher’s Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013:

“The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will

be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

27. It was therefore appreciated by **Ojwang, J** (as he then was) in **B vs. Attorney General [2004] 1 KLR 431** that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

28. A Court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realise that once they are brought to court they are subject to the jurisdiction of the Court. Under Article 159(1) of the Constitution, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. In exercising judicial authority the Courts and Tribunals are, *inter alia*, to be guided by the principle that the purpose and principles of the Constitution shall be protected and promoted. Under Article 10(1) of the Constitution the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2)(a) of the same Article the national values and principles of governance include the rule of law. **Musinga, J** in **Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 “A” of 2004** was of the view, which view I respectfully associate with, that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgement. Contemnors, the learned Judge held, undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court’s authority is not brought into disrepute. The Judge was however of the view that that recourse ought not to be to a process of contempt in aid of a civil remedy where there is any other method of doing justice, and the jurisdiction of committing for contempt should be most jealously and carefully watched, and exercised with greatest reluctance and greatest anxiety on the part of the Judges to see whether there is no other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject.

29. However, it must be noted that the contempt of court is an affront to judicial authority and therefore is not a remedy chosen by a party but is invoked to uphold the dignity of the court. The mere fact, therefore, that a party offended by disobedience of a Court order has floated his idea on what should be done to the contemnor, does not tie the court’s hands as to that mode of punishment although the Court may well take into account the suggested mode of punishment in appropriate cases.

30. It is therefore my view and I so hold that the Courts are not only empowered to commit for contempt but are under a Constitutional obligation to uphold the rule of law and in doing so to commit for contempt if the conduct of parties invite such course.

31. It is trite law that where committal is sought for breach of an order, it must be made clear what the defendant is alleged to have done and that which is breached. The application must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity in the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is higher than the standard in civil cases but lower than criminal standard, not being attained especially on affidavit evidence. Therefore generally the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order

he is liable to the process of execution. See Republic vs. Commissioner of Lands & 12 Others Ex Parte James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002, Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708 and Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.

32. However, where it has been brought to the Court's attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of technical procedures, the Court cannot turn a blind eye to the same. As was held in Gatharia K. Mutitika & 2 Others vs. Baharini Farm Ltd. [1985] KLR 227:

“It is quite clear on the authorities that anyone who, knowing of an injunction, or an order of stay, wilfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt... The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught.”

33. I therefore associate myself with Lenaola, J in Basil Criticos vs. Attorney General & 4 Others [2012] eKLR, Republic vs. Minister of Medical Services Misc. Civil Application No. 316 of 2010 that:

“...the law has changed and so as it stands today, knowledge supersedes personal service and for good reason...where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”

34. This position was adopted by Musinga, J in Republic vs. Minister of Medical Services (supra) and Kimaru, J in Gatimu Farmers Company vs. Geoffrey Kagiri Kimani & Others [2005] eKLR. In the former case the learned Judge expressed himself as follows:

“Article 159(2) (d) of the Constitution requires the court to administer justice without undue regard to procedural technicalities. Article 10 of the Constitution stipulates various national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution or any law or implements public policy decisions. The values include the rule of law, good governance, integrity, transparency and accountability. The rule of law is vital in the stability of any nation and its institutions. In this new constitutional dispensation, it would be a mockery of justice for a respondent in contempt proceedings to come to court and say that even though he was aware of the terms of a prohibitory order, the order was not properly served upon him or that he considered the same to have some procedural defect, for example, lack of indorsement thereon, and therefore he ought not to be punished for contempt of court.”

35. This is akin to the position taken by Akiwumi, J (as he then was) in Kenya Tourist Development Corporation vs. Kenya National Capital Corporation Limited & Another Nairobi HCCC No. 6776 of 1992 when he expressed himself as follows:

“An injunction in prohibitory form operates from the time it is pronounced, not from the date when the order is drawn up and completed. Consequently the party against whom it is made will be guilty of contempt if he commits a breach of the injunction after he has received notice of it, even though the order has not been drawn up...Where an order requires a person to abstain from doing an act, it may be enforced, notwithstanding that service, of a duly endorsed copy of the order has not been served, if the Court is satisfied that pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order is made or being notified of the terms of the order whether by telephone, telegram or otherwise...It is of high importance that orders of the Court should be obeyed. Wilful disobedience to an order of the Court is punishable as a contempt of court and such disobedience may properly be described as being illegal...Those

who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them.”

36. As stated in *Halsbury’s Laws of England*, 4th Edn. Vol. 5 para 65:

“Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph or otherwise.”

37. Therefore the law now is that once a party knows about the existence of a Court order, he can not be heard to claim that he was not served therewith since knowledge supersedes service. It is however upon the applicant to adduce evidence showing that the alleged contemnor actually or constructively knew of the order. Constructive knowledge may be inferred where the person alleged to have been in contempt of the Court order was an alter ego or proxy of the person upon whom actual service was effected. Once the applicant shows that service was actually effected on a person who is reasonably expected to have brought the existence of the Court order to the notice of the contemnor, it is my view that the onus shifts onto the alleged contemnor to show that the existence of the order was not brought to his attention.

38. In this case, I have gone through the record and there is no evidence at all that the persons sought to be punished for contempt herein were actually served. The only affidavit of service on record is sworn by one **Hendricus Odongo** on 21st January, 2016 and filed herein on the same day to the effect that on 5th January, 2016, he served the OCPD Buruburu Police Station who accepted service but declined to sign. On the same day he purports to have served the secretary of KANU along Kibera Road who accepted service but declined to sign. This application is however filed on 4th January, 2016 and dated 31st December, 2016. Without an earlier affidavit of service, it is incomprehensible how service which was effected after the application for contempt was filed can be the basis of such an application.

39. The issue of service has been the subject of judicial pronouncements in this country. In **National Bank of Kenya vs. Peter Oloo Aringo Kisumu HCCC No. 91 of 1998**, Warsame, J (as he then was) pronounced himself as hereunder:

“In order for the Court to validate a mode of service other than personal, which is mandatory, the person alleging proper service must have and prove in his return of service or otherwise the following: - [i]. The time when service was effected on the said person; [ii]. The manner in which the summons were served; [iii]. The name and address of the person identifying the person served; [iv]. The exact place where the service was effected; [v]. Whether or not the person served is known to the person the summons is meant for if the person is not known to the process server; [vi]. If no personal service, the person should indicate the relationship between the person served and the person summons were directed at; [vii]. The source of information in vi above must be stated; and [viii]. That he required his signature and response. Non-compliance with any command of the above would make any such service fatally defective and if there is no proper service there can be no regular judgement.”

40. In this case the interested party is a political party in this Country. It defeats reason why the process served could not effect service on any of its recognised offices instead of doing so along Kibera Road. The nexus between Kibera Road and the interested party has not been shown. Further process server has not deposed as to how he knew that the person he was serving was the said **Nick Salat**. In other words who identified the contemnors to the process server? In my view the information disclosed by the process server is so economical as to be the basis of an order for committal.

41. In light of the denial by the alleged contemnors that they were unaware of the existence of the Court order and in light of the insufficiency of the particulars of service of the order, it is my view and I hold that the applicants have failed to meet the threshold required for contempt of Court proceedings to be

sustained. Having considered the issues raised in the rivalling affidavits and taking into account the fact that in cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt, I am not satisfied that this is a fit and proper case for this Court to cite the persons named herein as being in contempt of Court. See **Gatharia K. Mutitika and Two Others vs. Baharini Farm Limited (1982-88) 1 KAR 863.**

42. In the premises I disallow the Application Notice dated Notice of Motion dated 31st December, 2015 which application is hereby dismissed with costs.

Dated at Nairobi this 18th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Abdulhakim for the applicant

Mr Munene for the 1st and 2nd Respondent

Cc Mutisya